Old Tucson Corporation *and* Retail Clerks Union, Local 727, chartered by United Food and Commercial Workers International Union, AFL-CIO *and* Edward A. Barrigar. Cases 28-CA-5929 and 28-CA-5950

28 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 10 April 1981 Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, concurring in part and dissenting in part.

I disagree with my colleagues' decision to adopt the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) when it discharged Thomas Doonan. Doonan was the Respondent's second most senior maintenance department employee,[1] and an identified union leader whom the Respondent had twice warned that union activities would lead to discharge. The Respondent defended its decision to discharge Doonan by asserting it was part of its cost-reduction program. I am not persuaded by this defense because the evidence shows the Respondent was satisfied with Doonan's work, it had already exceeded its personnel reduction goal before it discharged Doonan, and it hired another employee at a comparable rate to assume Doonan's duties. Accordingly, I would reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) when it discharged Doonan.

The Respondent operates a western theme park. Retail Clerks Union, Local 727, chartered by United Food and Commercial Workers International, AFL-CIO (the Union), began an organizational drive at the Respondent's park in autumn 1979. Doonan was a vigorous advocate for the Union. During the early part of the campaign he openly wore a button in support of the Union. Doonan stopped wearing the button after the Respondent's vice president, Larson, sent him a personally addressed letter, dated 19 October 1979, advising him that wearing the button at work was inappropriate and against company policy. (Twenty other employees received similar letters.) In October 1979, Larson advised Doonan that persons associated with the Union would be "out." Two weeks later the Respondent's acting maintenance supervisor, Edward Acres, then Doonan's supervisor, told Doonan that people working with the Union should exercise great care because "they were laying for anybody having anything to do with the Union." The Union lost the 21 December 1979 election by a vote of 32 for and 43 against representation, with 8 challenged ballots.[2]

In February 1980,[3] the Respondent hired Edward Barrigar as maintenance manager. Soon after, the Respondent informed Barrigar that Doonan was slated for discharge. In April, the Respondent's general manager, John Brown, began pressuring Barrigar to terminate Doonan. About the same time, the Respondent hired another experienced mechanic, Larry Shonfelt. In late May, Brown unequivocally directed Barrigar to discharge Doonan by the end of that month. Because Doonan was on leave for a few days at the end of May, the discharge did not occur until June 2. Barrigar marked "recommended for rehire" on the termination slip when he discharged Doonan. Brown expressed dismay that Barrigar had recommended Doonan for rehire. On Doonan's discharge, Shonfelt assumed Doonan's tasks.

At the time of his discharge Doonan was told that the discharge was part of the Respondent's cost-reduction program, a program the Respondent had instituted in early 1980. As a key component of that program, the Respondent sought to reduce the number of its employees. The maintenance department was to be trimmed from the 15 employees it had on 31 January to 10 employees. With Doonan's discharge the maintenance department was reduced

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] Doonan had worked in the maintenance department since 1972.

[2] The Union filed objections to conduct affecting the election results which it subsequently withdrew with the approval of the Regional Director for Region 28.

[3] The dates hereinafter are in 1980 unless noted otherwise.

to nine employees. One of the nine was the recently hired Shonfelt.

The judge rejected the General Counsel's position that the Respondent's decision to discharge Doonan was predicated on its abiding union animus. He found that the Respondent's antiunion conduct in October and November 1979 was limited in tone and extent and that its behavior from January to June 1980 indicates the Respondent's officers no longer harbored antiunion feelings. The judge looked to the December 1979 election results showing that 32 employees voted for union representation. He reasoned that, because there were other employees who supported the Union against whom the Respondent took no action, the action taken against Doonan was likely not motivated by union animus. Additionally, he found the discharge was reasonable from a management perspective in that Barrigar was not fully satisfied with Doonan. Finally, the judge concluded that the lapse in time between the Respondent's unlawful conduct during the campaign and Doonan's termination indicates that there was no plan to discharge Doonan for his union activities. I disagree.

The Respondent's union animus at the time of the Union's organizing campaign is demonstrated by the severity of threats made against Doonan and other employees prior to the election. Thus, Doonan was twice warned, once by the Respondent's vice president and once by his supervisor, that any employee's involvement with the Union threatened his job tenure. The Respondent's union animus is additionally demonstrated by letters to all employees who wore union buttons forbidding them from wearing such buttons.

The judge discounts the evidence of animus because it was remote from the discharge. While the actual discharge occurred several months after the election, the judge's findings ignore that the Respondent's efforts to accomplish it began almost immediately after the union election. As noted above, shortly after his hire in February, Barrigar was informed that Doonan was slated for discharge. This proximity in time to the election indicates that the Respondent was carrying out its earlier threats to Doonan. It is true that the discharge was some time in coming. That, however, was not entirely voluntary on the Respondent's part. Rather, as a practical matter, the Respondent was forced to retain Doonan because he was the Respondent's only mechanic; before the Respondent could reasonably discharge Doonan it had to secure another mechanic to cover Doonan's responsibilities. The Respondent accomplished that in April when it hired Shonfelt. After Shonfelt, under Doonan's direction, familiarized himself with the Respondent's equipment, Brown directed Barrigar to terminate Doonan. Thus, beginning shortly after the election, the Respondent undertook to rid itself of Doonan—an effort delayed only until it could arrange for the assumption of Doonan's responsibilities. This was accomplished by hiring and training Shonfelt. Accordingly, contrary to the judge's conclusions, I find there was no substantial lapse in time between the Respondent's antiunion conduct during the union campaign and the execution of its plan to discharge Doonan based on his union activities. The union animus, as expressed in the threats directed to Doonan, together with the Respondent's almost immediate announcement of its intention to discharge Doonan, indicates that the Respondent was motivated by Doonan's union activities when it discharged him.[4]

Despite the Respondent's claim that Doonan was discharged pursuant to its cost-reduction program, the Respondent, during the exit interview when Barrigar was discharged, expressed dismay over Barrigar's having recommended Doonan for rehire. The Respondent offers no explanation as to why it was displeased with Barrigar's recommendation. Nor does the record provide any substantial basis for concluding that the Respondent had a legitimate cause to fear Doonan's rehire. To the contrary, the evidence shows that Doonan's job performance was quite acceptable. Barrigar's testimony indicates he was pleased with Doonan's performance. He testified that Doonan was an excellent mechanic and displayed a highly cooperative attitude, including a willingness to work long and unusual hours when necessary. Barrigar further stated unequivocally that, if he were directed to reduce the number of maintenance department employees and thereby had to select an employee to discharge, he would not have selected Doonan because "[h]e was too valuable an asset to be gotten rid of." Barrigar's written evaluation of Doonan shows that Barrigar rated the quality of Doonan's work "excellent," and that he found Doonan handled "the majority of mechanical problems . . . and all welding and vehicular maintenance with ease." Barrigar rated Doonan "good" or "excellent" in every category. General Manager Brown signed this evaluation, thereby signaling his knowl-

[4] The judge's reliance on the fact that the election showed there were over 30 employees favoring union representation, against whom the Respondent took no action, as proof that the Respondent retained no union animus misses the point. The Respondent knew only the *number* of employees favoring union representation but did not know their individual identity. Doonan, however, was an identified union *leader* who had been told by two management representatives that an employee's union activities would lead to discharge. Therefore, that numerous other employees against whom the Respondent took no action apparently supported the Union is not particularly significant as to the Respondent's motivation in discharging Doonan.

edge of and apparent agreement with Barrigar's favorable rating of Doonan's work. Finally, Barrigar's recommendation of Doonan for rehire is evidence that Barrigar was satisfied with Doonan.

As the judge noted, Barrigar did testify that he had criticized Doonan on occasion; but his testimony as a whole does not indicate dissatisfaction with Doonan's overall job performance.[5] Rather, Barrigar's testimony indicates his criticism of Doonan was limited to the type of criticism that is common between supervisor and supervisee,[6] and to generalized griping to another supervisor that Doonan may have taken advantage of his job in a way Barrigar believed every employee takes advantage.[7] His "criticism" was directed only to Doonan and to a close associate, never to a higher management official in the form of a complaint on which he could anticipate that personnel action might be taken. In these circumstances, it is apparent that Barrigar's criticism of Doonan was limited and mild in nature. Clearly, Barrigar felt that Doonan's job strengths far outweighed his weaknesses, and that Doonan's abilities and performance made him a valuable employee in the Respondent's maintenance department.

The other possibly adverse evidence regarding Doonan's job performance was the testimony of Brown that he had been told by Louie Arms, the Respondent's inventory control manager of maintenance, that maintenance department employees, including Doonan, tended to sit around and "bad mouth" the Respondent. Arms did not testify. Brown did not assert that he relied on this accusation by Arms. In any event, the thrust of Arms' comments appears to be directed to the "bad mouth[ing]" of the Respondent and not directed to any substantial concern with respect to job performance. Further, the comments were directed to the maintenance department in general with Doonan simply being included in a list of the employees in the department engaged in such activity.

In light of the absence of evidence showing that Doonan's job performance was unsatisfactory or only marginally acceptable, I can only conclude that the Respondent's concern about Barrigar's recommendation of Doonan for rehire was grounded in its fear that a known union adherent might be returned to the payroll.

As noted above, the Respondent asserts that Doonan was discharged pursuant to its cost-reduction program. This assertion is pretextual as the discharge did not significantly further that program. One goal of the cost-reduction program was to reduce the number of maintenance department employees from 15 to 10. However, the Respondent had *exceeded* that goal *prior* to Doonan's discharge. Thus, the Respondent's cost-reduction goal had already been met before Doonan was discharged. According to its own design, the Respondent did not have to discharge Doonan or any other employee to satisfy its personnel targets. Further, it is obvious that replacing Doonan with Shonfelt did nothing to reduce the Respondent's overall employee complement.[8]

Of course, if the change of Shonfelt for Doonan had a significant effect on the Respondent's costs, the change might have been justified. However, Barrigar's testimony that Shonfelt was paid almost as much as Doonan stands uncontradicted. There is no evidence that the Respondent saved a signifi-

[5] Any criticism by Barrigar of Doonan would arguably be of more than normal importance since, as fully described by the judge, Barrigar's hopes that this discharge would be found unlawful were in large measure dependent on a finding that Doonan's discharge was for discriminatory reasons.

[6] The pertinent testimony is:

Q: Did you ever criticize at any time, Tom Doonan, for any of his work performance?

Barrigar: Sure.

Q: When?

Barrigar: I have no recollection of the dates or times.

Q: Do you have a recollection of what you criticized him about in his work performance?

Barrigar: No, sir, I can't name specifics. As a manager, as a supervisor. . . .

Q: You recall very specifically, these other discussions you had with him and meetings you had with him, but you don't recall criticizing him for any part of his work? You do recall criticizing him?

Barrigar: One thing I don't do is criticize. I make comments about the work and which way we have to go. I always try to keep on the positive side of it. There's a possibility that once a week, twice a week, three times a week, I could have made comments towards Tom Doonan as far as his work performance, as far as not getting something accomplished, not doing this, not doing that.

[7] The relevant testimony is as follows:

Q: Did you ever tell any other supervisor at Old Tucson that you were unhappy with Doonan's performance?

Barrigar: The possibility existed, yes.

Q: Did you ever tell any other supervisor at Old Tucson that you thought Doonan was shirking his work and taking advantage of his job?

Barrigar: Possibly.

Q: Did you make such statements to Tom Herbey?

Barrigar: I feel that I could have been relating information that I had received from . . .

Q: Did you make such a statement to Tom Herbey concerning Tom Doonan?

Barrigar: I really can't remember if the conversation took place. The possibility does exist because Tom and I talk quite a bit about the people, yes.

Q: So you could have told him then, that Doonan was shirking his job, taking advantage of his job? Isn't it true that's how you felt?

Barrigar: No, not really.

Q: What do you mean, not really?

Barrigar: I did not feel that way.

Q: You felt that way some of the time, but not all of the time?

Barrigar: I feel that every person, regardless of who he is, takes advantage of his job at one time or another. I feel there are different qualities in different people that are either tolerated or put down, depending on the individual. I feel that each person is treated as an individual, and that's my philosophy on dealing with people. . . .

[8] Indeed, that the Respondent hired Shonfelt indicates it did not feel the need to reduce the maintenance department further.

cant amount of money by hiring and retaining Shonfelt while discharging Doonan.

Finally, although the Respondent asserts it did not replace Doonan and that it hired Shonfelt to replace another already departed employee, that assertion is inconsistent with the uncontroverted facts.[9] Doonan was immediately assigned to train Shonfelt to perform the tasks Doonan was performing. Shonfelt assumed Doonan's work when Doonan left. There never was any indication that Shonfelt was to do anything other than to replace Doonan. Before Shonfelt's hire the Respondent had only one mechanic, Doonan. After Doonan's discharge the Respondent had only Shonfelt to do what had been Doonan's work.

For these reasons, I conclude that Doonan was not discharged for cost-related reasons. Rather, the Respondent discharged Doonan because of his union activities during the organizing campaign the previous year. Accordingly, I would find that the Respondent violated Section 8(a)(3) and (1) of the Act when it did so.[10]

[9] While the Respondent's documents may technically indicate that Shonfelt was a replacement for laborer-utility man Stan Bertram, it is quite clear that the Respondent planned that Shonfelt would take Doonan's place as a mechanic.

[10] Although I would reverse the judge as to Doonan, I would not disturb his findings as to the lawfulness of Barrigar's discharge. The General Counsel contends that the Respondent discharged Barrigar because Barrigar refused to assist in the commission of an unfair labor practice, that is, Doonan's unlawful discharge. However, the credited evidence is inconsistent with the General Counsel's theory. The Respondent's search for someone to take Barrigar's place began in early April when the Respondent placed an advertisement in a local paper for a maintenance department manager. Further, although Doonan was not discharged until 2 June, the Respondent's officers seemed to sanction Barrigar's delay in effectuating Doonan's discharge until Doonan's responsibilities were covered by Shonfelt. Thus, although I would find the Respondent's discharge of Doonan to be unlawful, it is not apparent that the delay of that event constituted a refusal by Barrigar to assist in the commission of an unfair labor practice. Rather, the delay was for a logical business reason. Accordingly, I would find that Barrigar's discharge was not for his refusal to commit an unfair labor practice. Cf. *Belcher Towing Co.*, 238 NLRB 446 (1978), enfd. 614 F.2d 88 (5th Cir. 1980).

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. The case was heard at Tucson, Arizona, on January 20, 1981, based on a consolidated complaint alleging that Old Tucson Corporation, the Respondent, violated Section 8(a)(1) and (3) of the Act by discharging Thomas Doonan because he assisted, supported, or joined Retail Clerks Union, Local 727, chartered by United Food and Commercial Workers International Union, AFL-CIO, called the Union, and engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and that it soon thereafter discharged its supervisor, Edward Barrigan, because he failed and refused to cooperate fully with the Respondent in the assertedly unlawful discharge of Doonan and in order to discourage its employees from joining, supporting, or assisting the Union or engaging in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

On the entire record, my observation of witnesses and consideration of posthearing briefs, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW

In fall 1979, the Union mounted an organizational drive culminating in a representation petition filed November 7 of that year relating to all full-time and part-time employees with customary exclusions.[1] Among the included employees Danny Stewart instrumentally aided this effort by wearing a union button, passing out authorization cards for signature, and generally talking up support. Based on a stipulation for certification, a secret-ballot election was conducted December 21, 1979, for which a tally showed the majority of votes cast against the Union. As this all transpired Stewart had been terminated from employment, and had filed an unfair labor practice charge in that connection. In January 1980 the parties settled Stewart's claim as well as the Union's pending objections to conduct affecting results of the election, and the Regional Director for Region 28 approved withdrawals of both the C and the R cases.

By November 1979 John Brown had assumed the position of general manager after previously serving the Respondent in an interim management capacity. At this point in time Jack Westenborg was executive vice president and director (as well as being a director for Westworld, Inc., the Respondent's parent corporation), while George Larson Jr. was vice president and director of purchasing. Subordinate to Brown as general manager were a grouping of departmental managers, including Edward Acres as acting supervisor over maintenance.

Thomas Doonan, a maintenance mechanic and welder employed with the Respondent since 1972, was an even more vigorous adherent than Stewart in the Union's organizing drive. Doonan had originally recruited Stewart to the cause, had solicited about a dozen authorization cards from other employees, and had openly worn an identifying button for several days until (along with approximately 20 others) he was directed in writing not to wear it.[2] Doonan testified that during October 1979

[1] The Respondent maintains a principal office and place of business in Tucson, Arizona, where it is engaged in the operation of a western theme park, which it also rents as a motion picture location site, and annually derives gross revenue in excess of $500,000 while purchasing goods and materials valued in excess of $50,000 which it causes to be transported directly to its facility from suppliers located outside Arizona. On these admitted facts, I find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Sec. 2(5).

[2] This directive emanated from Larson on October 19, 1979, as a letter addressed individually to each cautioned person. It read:

> It has come to our attention recently that you are wearing a button which is emblematic of a labor organization. In our opinion, the wearing of any type of button (political, commercial, charitable, labor, etc.) while at work is inappropriate and against company policy. Because of the contact of our personnel with the public, any type of button can serve as a distraction and be disruptive. Furthermore, buttons are certainly not in keeping with the image of the old

Continued

Larson had spoken to him, saying that persons associated with the Union would find themselves "out." Doonan also described another conversation about 2 weeks later with Acres, who said that extreme care should surround any activity for the Union because "they were laying for anybody having anything to do with [it]."

Edward Barrigar succeeded Acres as maintenance manager on February 11, 1980, after being hired by Brown "in conjunction with" Larson. At that point in time the department's strength was about 14 persons, and Barrigar testified that he found its functioning in some disarray. With this in mind he commenced a number of techniques to improve teamwork and in the process held departmental meetings, issued written materials to personnel, sought to heighten communication, and set more precise objectives as to maintenance procedures. Barrigar testified that coextensive with his initial managerial activity he had experienced "briefings" by Westenborg, Brown, and Larson in which he was informed that because certain employees had supported the Union a gradual course of terminations should ensue to the end that a weeding out of persons, specifically to include Doonan, would result. In this regard Westenborg (with Brown present) had once assertedly asked about the precise "status" of Doonan, while the sole briefing from Larson had involved this official mentioning a "getting rid" of Doonan.[3] By April Brown was pressing frequently for the termination of Doonan, to which Barrigar had countered that it was not then feasible because of recently initiated maintenance projects. Barrigar testified that by May Brown agreed to the preliminary step of seeking a potential replacement for Doonan, and to this end Barrigar had processed paperwork through personnel functionary Nancy Wilson resulting in the appearance and hire of Larry Shonfelt. In late May, Brown unequivocally directed Barrigar to fire Doonan on the last working day of the month, and while Barrigar acceded to this the actual step was put over to June 2 because Doonan would be away just at month's end. The discharge and exit interview took place between Barrigar and Doonan with Wilson present as a witness. During Barrigar's tenure up to this point he had terminated several other persons for cause, but only one other instance where "cost reduction" was the basis.[4] Barrigar testified that in his opinion Doonan was an excellent mechanic and displayed a highly cooperative attitude including that of a willingness to work long and unusual hours when necessary. In processing this termination Barrigar added an entry on personnel forms recommending Doonan for future rehire.

Doonan had had no significant contact with the Respondent's executive hierarchy following the late 1979 remarks of Larson; however, he testified that soon after Barrigar became head of maintenance he had cautioned Doonan about employee "rotation" concepts being formulated by higher management and that Doonan should "watch" himself. Doonan recalled how Barrigar had added that if questioned he would be forced to deny making such remarks. Doonan remembered that Shonfelt had worked with him as a mechanic for about a month before his own termination, and that he had extended much training to this new colleague. The only departmental employee with longer service than Doonan was carpenter Bob Rasmussen.

The Union filed an unfair labor practice charge relating to Doonan's termination on June 9, and it was routinely served on the Respondent by letter of that date.[5] On June 12 Barrigar was summoned to Brown's office. Barrigar testified that Brown said Doonan had "filed suit against Old Tucson because of his termination," and Barrigar represented "damage [that] had already been done." Brown then handed Barrigar a written performance appraisal in which he had been faulted as to cooperation, diplomacy, tact, creative management, improvement of departmental morale, ordering procedures, project scheduling, and as to not "acting and performing in the best interest of the company." In the further flow of discussion Brown said that the recommendation of Doonan for rehire was a doing of "something wrong," and Barrigar was next asked to resign. He demurred to this and was thereupon terminated as Brown grew increasingly "solemn and very stone-faced."

The Respondent contends that Doonan's termination was a routine and integral part of its cost-reduction program as necessitated by declining revenue from tourism, while Barrigar's discharge was based on dissatisfaction with his performance during the several probationary months he had served. Brown and Westenborg testified in the composite that cost effectiveness of departments became paramount to the Respondent's business future, and that attention in this regard emanated from formal board of directors' action of both the parent and subsidiary corporations. Westenborg testified that profitability was pronouncedly down over the latter part of 1979, and he had been particularly concerned about workings of the maintenance department both because it did not itself produce revenue and because of continuing high maintenance costs including outside services. Brown testifed that this commission was to reduce personnel in the range of 22–30 persons starting in February. By June 30 there were 18 fewer persons (out of an approximate total of 160) as compared to the first of the year, and further economies had been realized by supplanting higher income employees. In this connection a "termination history" of the maintenance department showed various

west and our dress requirements. Finally, a button could be construed as a form of solicitation. As you know, solicitation is not permitted on our premises during normal work time and the normal work time of other employees.

For the reasons outlined above, we are advising you that all buttons of any type are inappropriate to wear at Old Tucson and should be removed.

We also want to assure you that how you feel about a union is your business and that no reprisals will be taken against you because of your union activities, sympathies or desires. However, we will not tolerate anything that is disruptive to our operation or that is harmful to our image with the public.

[3] All dates and named months hereafter are in 1980, unless shown otherwise.

[4] This person was Donna Carter who was discharged May 23 from her position of art department assistant, a jurisdiction which Barrigar had assumed shortly after being hired.

[5] The return receipt card ordinarily accompanying such a transmittal letter of service cannot be found by the office of Region 28, and is therefore missing from formal papers in evidence.

changes, including departures from the art department and reduction in laborers plus one utility man and Doonan.[6]

Westenborg further testified that in late April he had advertised in the Tucson daily newspaper for an experienced maintenance manager,[7] while Brown affirmed a performance appraisal rendered May 8 on Barrigar which concluded with a statement that his managerial performance would be followed for a further period of time as an evaluation of "his benefit to the company." Brown had also recorded his imminent termination interview with Barrigar and the fact that his resignation was being requested. Brown testified that, during the exit interview of June 12, he was not even aware of the Doonan charge.

This case requires credibility resolutions, and following that a holding in which the two chief issues are intertwined. The General Counsel contends that Doonan's discharge, though many months after his protected activity and many months before the Union could again petition for an election, was essentially based on the Respondent's abiding "animus" toward the prospect of being organized, and that Barringar's discharge was the unlawful separation of an admitted supervisor whose sin was only that he did not faithfully participate in an unlawful scheme to permanently rid this employer of Doonan. The intertwining is present because to the extent that Doonan's case has merit it would show an even more likely basis of resentment toward Barrigar, while if Doonan's case is otherwise it would follow that the Respondent would have had little or no reason to be influenced toward Barrigar in terms of his role in Doonan's ultimate departure.[8]

As to actual utterances, I am not persuaded to accept the critical testimony of the General Counsel's witnesses. The Respondent had reacted quickly to the advent of union activities in late 1979 with a no-solicitation rule and a prohibition on the wearing of buttons, while Westenborg testified pointedly that he wanted no unionization at the Respondent and saw it as a phenomenon best skirted with enlightened actions to assure employees both benefits and recognition superior to what a labor organization could provide. As to events in this time period I credit Doonan over Larson as to the cryptic thought that an employee would be "out" if not aligned with the employer, and the gossipy remark attributed to Acres about unidentified forces "laying for" employees during the organizing campaign stands uncontradicted and therefore accepted as fact. However, the 1979 conduct does not constitute any litigated matter and is only general background, while the Respondent's strategy as testified to by Westenborg is on the surface or in the abstract a permissible approach to the subject.

In such context I find no reason to doubt the fact that the Respondent's revenue had recently lessened, that it did in fact seek to economize, that Barrigar was not well ensconced in his position as evidenced by running a classified ad seeking his replacement, and by Brown's recorded dissatisfaction of early May. As to claimed remarks about which Doonan testified, I find contrary to his denial that Larson in late 1979 did caution Doonan about involvement in support of the Union. Further, I find that during Barrigar's exit interview Brown had alluded to the fresh unfair labor practice charge concerning Doonan, and expressed dismay over Barrigar having formally recommended him for rehire. The departure I take from credibility findings innocuously favorable to the General Counsel is in regard to the content of remarks made to Barrigar around April when the Respondent began implementing its cost-reduction efforts by passing down objectives to lower supervision. Here I believe that in the "briefings" Doonan was referred to only as a long service and more highly compensated employee, and it is only through suggestibility coupled with Barrigar's obvious sympathy toward Doonan that he has associated reference to protected activities in what Westenborg, Brown, and Larson were saying to him at the time.[9]

As a threshold matter the management of the Respondent's operation over nearly a year's period prior to Barrigar's termination was troubled at best. During the summer and early fall of 1979 it was undergoing outside consulting study and Brown became newly installed only in November of that year. A union organizing campaign only complicated matters and the case settlements of January can carry no adverse implication or admission of wrongdoing. Barrigar's accession to a managerial role was shortly followed both by the rather bizarre departure of former "right-hand man" (or supervisor) Rob Muster, three other workers simultaneously, and soon the art department manager. In this unsettled atmosphere the management style of Barrigar found a responsive subordinate in Doonan, and reciprocally Barrigar became gratifyingly pleased with Doonan's pliant and convenient functioning. Yet the question is whether the General Counsel has from the totality of probative evidence made out a prima facie case, and I conclude it is not present. See *Wright Line*, 251 NLRB 1083 (1980). The animus that has been labeled with respect to the Respondent's

[6] The document shows that Shonfelt was actually hired in April to replace a laborer. Barrigar's own recollection of retrenchment in his department was that it went from 14 to 8.

[7] This advertisement appeared in the classified "Help Wanted" columns over the period April 26–28. It read:

> WE ARE seeking an experienced, mature individual to assume responsibility for our company's in-house repair, maintenance, construction & operation program. The successful candidate will have experience in this field, be well organized, be able to manage people well, be able to set priorities and be able to successfully implement a management by objectives program. Reply in confidence stating objectives, previous experience & salary requirement to Star-Citizen, Box 732-D, 85726.

[8] The notion involved is sometimes popularly termed "bootstraps" doctrine.

[9] The credibility resolution as between Barrigar and Larson is particularly close on demeanor grounds. While Larson's denial of having made any untoward admission was vehement, it was only marginally persuasive. On balance, I am convinced that Larson gained some sophistication during the Respondent's skirmish with the Union and, while speaking in this context, did not in truth project any conscious expectation that Doonan would be removed because of being an agitator for the Union. The fulfillment of this balancing endeavor is my further belief that Barrigar has practically destroyed his veracity by manifesting a rigidity of thought which would not permit comprehending the actual corporate-oriented pedantics that both Westenborg and Brown would seek to imbue.

past conduct is limited in both tone and extent, while the long passage of time from January to June suggests no abiding motivation was present at the Respondent's highest councils to single out Doonan for discrimination. There were, after all, numerous other employees who from the tally of ballots were also known to have voted for the Union (by number not by identity), while Stewart who was reinstated to employment soon chose to quit on the rather subjective basis that he was given little work to do. Furthermore Acres had worn a union button prior to being elevated to the "maintenance foreman" position. (Tr. 48.) Additionally there is evidence that Barrigar was not fully satisfied with Doonan as an employee, had openly said so, and even from the witness stand tacitly admitted to unhappines with Doonan and having criticized him. (Tr. 96, 106-107.) The 1979 performance appraisal of Doonan alluded to needed improvement with respect to organizing his duties and better understanding them, and had been so interpreted to him orally by former "boss" Fred Curtis. (Tr. 65.) Such marginality could hardly be lost on the Respondent's higher officials, and would but foster their interest in labor cost reduction available through utilization of the "mechanical abilities" possessed by Shonfelt. I am mindful of Doonan's long service with the Respondent, yet the countervailing considerations are that an unprecedented drop in tourism revenues as reflecting the national economy occurred, and a less complacent management mood impinged in the persons of Westenborg and Brown particularly. I thus conclude upon viewing all facts that the allegation of Doonan having been discriminatorily discharged is not supportable.

As written above, this conclusion strongly undercuts the case filed by Barrigar. While I first infer that Doonan's unfair labor practice charge was in the Respondent's hand well before Brown spoke with Barrigar,[10] the actual dynamics of this termination had been set in motion long before. Here, the General Counsel must prove that an actual reason for terminating a supervisor was refusal to assist in the commission of unfair labor practices, and while I recognize that the Respondent harbored dismay over Barrigar's delay in, and distaste for, the separation of Doonan, it was only his failure to carry out such orders and a general dissatisfaction with his performance that caused the discharge rather than because he had interfered with any unlawful scheme. Barrigar's testimony, as would permit a contrary conclusion, is unreliable from a demeanor standpoint and is tinged with paranoid suspicions often departing from reality. I refer here to his unsupported claim that another department was involved in unlawful employment manipulation, and that he has shown himself utterly incapable of comprehending the nuances of what Brown and Westenborg were credibly to have said on the subject of permissibly counteracting the Union. (Tr. 133-135, 162-163.) It is particularly significant that the Respondent advertised for his replacement a full 6 weeks before the termination occurred, and Brown's failure to mention this fact in an investigatory affidavit is not unusual given that Westenborg was the person actively involved.

Accordingly, I render conclusions of law that the Respondent has not violated the Act as alleged, and issue the following recommended[11]

ORDER

The consolidated complaint is dismissed in its entirety.[12]

[10] I note that formal papers in evidence show that the other charge and amended charge were duly served on the Respondent within 1 day, and the certified mail article was signed for at the Respondent's business office. From this I expect that the earliest charge was also similarly received, and that in the ordinary course of business Brown in particular would have been promptly informed of the proceeding. I therefore discredit Brown's denial of knowledge, finding this to be an unworthy attempt at aiding a party with whom he still has allegiance based on employment as recent as mid-December.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] In its answer to the consolidated complaint the Respondent requested reimbursement of costs and reasonable attorneys' fees, referring Pub. L. 89-507, § 1; 80 Stat. 308. By its terms Pub. L. 89-507 applies, in part, to a potential recovery of costs in an action by an agency of the United States brought *in any court* (emphasis added). Even should the Respondent be here construed as the "prevailing party," the application of this statute to NLRB proceedings is unprecedented and in my view inappropriate. Further the "fees and expenses of attorneys" are expressly excluded from such costs as might discretionarily be taxed against the United States, a provision in complete harmony with legislative history of this law. *West Publishing Co. U.S. Code Congressional and Administrative News*, vol. 2, p. 2527 (1966).